

CLEEREMAN FOREST PRODUCTS,)	AGBCA No. 2000-101-1
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Appellant)	
)	
Representing the Appellant:)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

November 1, 2001

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion by Administrative Judge VERGILIO; a separate concurrence by Administrative Judge WESTBROOK; a separate concurrence, in part, and dissent, in part, by Administrative Judge HOURY.

Opinion by Administrative Judge VERGILIO.

On October 12, 1999, the Board received this appeal filed by Cleereman Forest Products, of Newald, Wisconsin (purchaser). The respondent is the U. S. Department of Agriculture, Forest Service (Government). The purchaser on the Northern Pike Timber Sale contract, No. 027403, in the Iron River District of the Ottawa National Forest, Michigan, seeks relief based on alleged timber volume overstatements in the contract, claiming that the Government actions reveal gross inadequacies and negligence in the preparation of the estimates, and that such actions resulted in calculation and input errors in the volume estimates. In its modified claim, the purchaser seeks a volume adjustment for timber, with a corresponding contract price reduction of \$78,164.53, and reimbursement of its costs associated with pursuing the claim, \$5,607.60. The contracting officer denied the claim.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. The parties have opted not to have a hearing, submitting the case on the written record. The evidentiary record is the supplemented appeal file. The parties have submitted briefs, with a discussion of the facts and legal arguments.

In its complaint, the purchaser seeks a contract price adjustment of \$88,534.54 which represents the same price reduction as in its claim for the volume variation and an increase, to \$10,370.01, for its costs of perfecting and pursuing the claim. The purchaser maintains that the Government improperly conducted the cruise from which volume estimates were derived. The alleged errors include inaccurate counts of the trees to be removed, and unverifiable sample tree data. The purchaser contends that it is entitled to relief under the Adjustment of Volume clause (because input and calculation errors resulted in volume variation in excess of given thresholds) and because the Government's actions constitute a breach of the contract.

The Government contends that the Board should deny the appeal, because the contract contains both disclaimers of the volume estimates and affirmative statements from the purchaser that it did not rely upon the estimates when formulating its bid. The disclaimers by the Government and affirmative statements by the purchaser do not act as bar to relief, which is dictated both by the Adjustment in Volume clause (which requires correction without regard to purchaser reliance) and by breach of contract (because the Government failed to comply with contract provisions). The contract does not place upon the purchaser the risk of having the Government conduct the sale without regard to the dictates of the handbook, with which, the contract specifies, the Government's actions are to comply.

The Board concludes that the purchaser is entitled to relief. The Government used incorrect and unsupported tree counts and sample tree data in generating the volume estimates. The erroneous detailed cruise data resulted in computer input errors and calculation errors in determining the volume estimates. The Adjustment of Volume clause provides a basis for correction.

The purchaser has established a basis for broader relief: breach of contract. The contract specifies that the estimated quantity of timber has been determined by the standard procedures described in a Forest Service Timber Cruising Handbook. The Government failed to abide by the described procedures in accumulating the detailed cruise data. The deviations were numerous and substantive, with a material impact on the volume estimates utilized in the contract.

The Board grants this appeal in part. The Government is to reduce each volume estimate in the contract by 30% for pulpwood and 23% for sawtimber, as requested by the purchaser. Further the purchaser is entitled to recover its costs incurred prior to this litigation, \$5,607.60 of its requested costs of \$10,370.01; the record does not demonstrate that the remainder of the amount was incurred other than in pursuit of this litigation. The purchaser is entitled to interest pursuant to the CDA, 41 U.S.C. § 611.

FINDINGS OF FACT

The cruise and check cruise

1. The underlying contract specifies that the estimated quantity of timber has been determined by the standard procedures described in the applicable Forest Service Timber Cruising Handbook (Exhibit O at 255 (¶ CT6.8)) (all exhibits are in the appeal file). The handbook specifies: “Regions and Forests shall use the procedures provided in this Handbook when cruising timber for sales” (Exhibit MM at 5-1 (¶ 03)) (emphasis added). The handbook discusses cruising a forest prior to a sale. The objective of timber cruising is to provide reliable estimates for timber appraisals. The timber volume estimate serves as the basis for payment on tree measurement sales. (Exhibit MM at 5-1 (¶ 02).) A chapter of the handbook enunciates principles of measuring trees, introduced, in part, as follows: “Timber cruising is the determination of the gross and net product volume and value (timber quality) for a tract of timber. It involves measuring tree diameters and heights, estimating defects, and making other determinations, such as grade and form class, that may be specified by the cruise plan.” (Exhibit MM at 13.11-1.)

2. Of various cruising methodologies identified in the handbook, one is the “sample-tree with complete tally”:

In this method, single trees are sampled with equal probability of selection. Define the population(s) and components to be sampled. Some form of stratification may be used, either based on species, species groups, diameter breast height (DBH) classes, or a combination of these. In some cases, define a non-sampled (100-percent measured) component. Such a component might consist of trees above a certain DBH class, or trees of certain species estimated to have too few trees to yield the required minimum number of samples at the prescribed sampling frequency. To use this cruise method, make a complete tally of the population being sampled.

(Exhibit MM at 33.2-1 (¶ 33.1).) This methodology was said to be used on this timber sale (Exhibit JJ at 4 (¶ 21)).

3. The handbook addresses the operational features of this methodology:

Select trees without bias. Select trees randomly to meet the requirement for unbiased sample unit selection. Ensure randomness by using dice, poker chips, marbles, or random numbers in the selection process.

Systematic sampling (sampling every nth tree) may be used in certain controlled situations, where the cruiser does not keep track of their own samples. In such applications, someone other than the cruiser records the cruise data. This is to control personal bias on the part of the cruiser.

Sample-tree cruising is best done with a crew of three or four marker-cruisers and a tallier. This system loses its advantage in scattered timber. Crew members function as both marker and cruiser. The main advantage is that the tallier keeps the tree

count and calls the sample trees to be measured as they come up, thereby removing a possible source of bias in sample selection.

The cruiser receiving the sample-tree call measures the sample-tree and either records the data or calls it in to the tallier. Identify cruise trees for later check cruising with the cruiser's identification and the tree number.

Conduct an accurate tree count and avoid missing trees or double-counting to ensure accurate results from this method. The best way to do this is to mark the tree, then report it to the tallier.

(Exhibit MM at 33.2-1 (¶ 33.11)) (emphasis added).¹

4. Based upon the tree counts and sample tree information (e.g., diameter, height, percentage of defects), the Government determines volume estimates for the sale. The total number of trees and the total number of trees in the sample, as well as volume estimates based upon the sample information, are factors in the sample expansion to determine the sale volume and the sampling error. (Exhibit MM at 33.3 to 33.4-1 (¶¶ 33.31, 33.32).)

5. The handbook specifies, "Only those persons holding valid certification for the type of work being performed will be allowed to cruise timber"(Exhibit MM, OTT Supp. 2409.12-95-1, May 1995, at 3 of 5 (¶ 63.3d.3)). The handbook permits the Regional Forester to provide standards for the use of uncertified cruise assistants to help in the collection of cruise data (Exhibit MM (¶ 61)).²

¹ The suggestions and statements found in the declaration of the Regional Timber Measurement and Valuation Specialist for the Eastern Region largely are misguided or misinformed. For example, although the individual states that tree counts need not occur, such is not relevant given the chosen methodology (sample tree with complete tally). Even if there is no national or regional standard for accuracy of tree counts, such does not explain why an incorrect count is not correctable under the contract. What is stated to be "a fairly common practice to identify only some of the cruise trees" is not supported by a reference to the handbook or regional supplement, and does not overcome the mandatory nature of the handbook. (Exhibit JJ.)

² A certification list, said to be effective April 1, 1998, indicates that one of eight initial cruisers had an expired certification in tree measurement (Exhibit A at 1). The individual identified as not possessing a current certification to conduct a timber cruise was the sole individual identified on some cruise cards. (Exhibits B at 2, 6, 20, 31, 42, E at 175). The timber sale report, dated July 16, 1998, identifies the same individual as having an expired certification, one of the initial cruisers as a trainee, and two other initial cruisers as having expired certifications (Exhibit E at 175). The declaration of the Regional Timber Measurement and Valuation Specialist for the Eastern Region at issue that "experienced, certified cruisers were used" (Exhibit JJ at 3 (¶ 13)) is misleading. It does not resolve whether uncertified cruisers were used as well and provides no indication of the support for the conclusion in light of the contradictory evidence in the contract records prepared by the Government and the admission by the Government that "two of the cruisers on this sale had been

previously certified, but their certifications had expired. All were working under the direct supervision of three certified and qualified cruisers.” (Answer at 7-8 (¶ 50).) Given the other conclusions of the Board, no specific factual determination is necessary regarding each cruiser and his or her certification or lack thereof, and the impact thereof.

6. The cruisers were to count every merchantable tree that was marked to be cut as part of the sale. On tally sheets, each cruiser was to identify the payment unit number (one of eighteen for the sale), tally tree number, species (by code), dbh (i.e., diameter at breast height), sample group number (one of seventeen, differentiating or combining various characteristics), tree count (the number of actually counted trees the sample was to represent), each of two heights (or 8-foot sections) on the tree for use as sawtimber and pulpwood (or topwood), defects (in 10% increments) for each of the heights, and the tree grade. (Exhibit B at 2-51.)

7. The cruisers marked or identified some but not every tally tree (Exhibits X at 292 (¶ 8), 295 (¶ 8), 297-98 (¶¶ 7-8), 301 (¶ 8), 307 (¶ 8), Y at 312 (¶ 4), GG at 1-2 (¶ 7)). The cruisers often sampled every nth tree (for example the first, fifth, or eleventh tree of a sample size), although the record indicates that controlled conditions were not present or satisfied, as each cruiser typically kept track of his or her own sample and recorded cruise data, and cruisers selected sample trees from the same clusters at the start of each cruise (Exhibits X at 291 (¶ 6), 292 (¶¶ 19-20), 294 (¶ 6), 295 (¶¶ 19-20), 297 (¶ 6), 298 (¶¶ 19-20), 300 (¶ 6), 301 (¶¶ 19-20), 303 (¶ 6), 304 (¶¶ 19-20), 306 (¶ 6), 307 (¶¶ 19-20), 309 (¶ 6), 310 (¶¶ 19-20), Y at 312 (¶ 5), GG at 1-2 (¶ 7)).

8. The initial cruisers have provided other comments, including: “On occa[s]ion some tally trees at the end of the day were made up based upon best judgement as to diam[eter] & h[eight]” (Exhibit X at 292 (¶ 12)). “If a tally was missed & then ‘made up’ then would use an average. Only on occasion but not personally.” (Exhibit X at 302 (¶ 25).)

9. The check cruiser has declared that his “job is to make sure the cruisers are following the proper procedures in cruising and marking the sale. It is not my job to re-cruise and confirm the quantity and quality of the estimates made by the crew.” (Exhibit FF at 1 (¶ 5).) Further, the check cruiser has declared that check cruising was done to validate the accuracy of tree measurements and species identification, assess defect estimation, and assure that product and quality determinations were acceptable (Exhibit NN at 1-2 (¶ 5)).

10. The tally sheets of the check cruiser placed into the record do not identify the tree number or payment unit of the selected trees. The notations of the check cruiser include: “could not use several tallies due to legibility,” “marked trees right in the middle of int. stream,” “empheral/intermit stream between [two payment units] had trees marked in 25 ft no cut zone why?” Notations also state, why was not the paper birch, fir, and aspen marked, although there is no indication of quantity, size or location. (Exhibit D at 167-71.)

11. The tally sheets of the check cruiser identify for eighty-five trees the species, dbh (i.e., diameter at breast height), the number of sawlogs (8-foot sections) and percentage of defects thereof, and the number of 8-foot sections and percentage of defects thereof of topwood or pulpwood, as well as the initial cruiser. For thirty-two of the trees (numbers 5, 6, 9, 10, 14, 16, 17, 22, 23, 26, 27, 30, 32, 38, 39, 45, 48, 51, 52, 56, 61, 63, 64, 66, 71, 74, 75, 78, 80, 81, 82, 83), the check cruiser noted at least one variation from the initial cruiser (this excludes one tree, number 47, with a difference in dbh of .1 inches, said to be within acceptable tolerances given the variations in trees, and one tree, number 29, for which the check cruiser provided an annotation: “could of called it a saw” timber as

opposed to pulpwood). Some of the discrepancies are diameter measurements in excess of .9 inches, and differences in defects of up to 50%. Of the thirty-two trees, there are eleven trees for which there is a single occurrence of one of the following: a diameter difference of less than .3 inches, a saw log or a pulpwood difference of only one 8-foot section, and no more than 10% difference in defect for sawlog or pulpwood; other trees involved larger differences or multiple differences (Exhibit D at 167-71.)

12. The allowable error for volume is +/- 5% between the initial cruisers and check cruiser (Exhibits MM, OTT Supp. 2409.12-95-1, May 1995, at 3 of 5 (¶ 63.3d.3), NN at 4 (¶ 23)). The check cruiser states in a memorandum dated July 28, 1998, to a district ranger: "A comparative analysis of check cruise data versus original cruise data showed a total sale volume error of 3%. This is within the acceptable limits allowed. Good Job." (Exhibit D at 154.) This comparison considers the eighty-five trees, not the "several" trees identified as tally trees with illegible data by the initial cruisers but which the check cruiser could have measured (Finding of Fact (FF) 10; Exhibit D at 155-71).

13. The check cruiser acknowledges that all tally trees were to be identified by ribbons, and recognizes that clustered samples may not have been representative of the stand of trees (Exhibit X at 281 (¶ 7), 283 (¶ 24)). The Government admits that the cruisers clustered tally trees when they started numbering, but denies, without supporting data or explanation, that such resulted in a biased sample (Answer at 5 (¶ 25)).

14. Utilizing the tree counts and tally tree information of the initial cruisers, the Government generated various reports, including volume estimates for various species or classes, for sawtimber and/or pulpwood (including topwood), and for the sale as a whole (Exhibit C at 52-179). Report A2, listing of tree measurements and characteristics, contains the information from the tally cards, and does not reflect the data ascertained by the check cruiser (Exhibits B, C at 56-71). Report A5, volume information, reveals volumes on a per acre/per strata basis for each tally tree, based on the average number of trees the sample tree represents in the total count (Exhibit C at 73-86). The record does not explain variations in the reports. For example, report B1, low level volume summary, depicts a total net volume of 8114.47 CCF (hundred cubic feet), although the actual total of the figures is 8124.46 (Exhibit C at 87-92). Summing the net CCF per payment unit in Reports A5 and B1 reveals similar totals for each payment unit. In contrast, are Report L3, volume by species within payment unit for each stratum, and Report L5, volume by species within payment unit across all strata. Report L3 depicts a sawtimber volume of 1325.17 CCF (all references are to net, which reflects deductions for ascertained defects, not gross), and a pulpwood (and topwood) volume of 7521.81 CCF, for a total of 8846.98 CCF (Exhibit C at 117); Report L5 depicts similar figures. (Exhibit C at 108-17).

Prospectus

15. On August 5, 1998, the Government issued a sale summary for the Northern Pike Timber Sale in the Ottawa National Forest, Iron River Ranger District. The summary notes that trees to be cut have been marked. The summary specifies eleven volumes in hundred cubic feet (CCF)

differentiated by species (mixed conifer, mixed hardwood, sugar maple, yellow birch, red/white pine, paper birch, aspen, pine) and product (sawtimber and/or pulpwood). For each, the summary notes one thousand board foot (MBF) volumes for sawtimber and cord volumes for pulpwood, along with an annotation that “MBF/cords estimates are given for information only.” Advertised rates are stated for each item. The sawtimber volume totals 1091 CCF; the pulpwood volume totals 7759 CCF. Thus, the total volume is 8850 CCF. (Exhibit F at 180.)

16. Bearing the date of August 5, 1998, the Forest Service issued a timber sale prospectus for the sale. The introduction of the prospectus states:

This prospectus furnishes prospective bidders with information, not contained in the published advertisement and is designed to enable bidders to decide whether or not to further investigate the sale. The contract does not include descriptions, estimates and other data in this prospectus unless otherwise stated. . . . Sale area and sample contract should be inspected before submitting a bid. The appraisal, other information on the timber, and conditions of sale and bidding may be obtained at Forest Service offices named in the attached advertisement.

(Exhibit G at 181 (¶ 1).)

17. The prospectus notes that units have been “cut tree marked”:

All LIVE trees within ALL payment units, designated for cut tree marked (CTM) as shown on the Sale Area Map are designated for cutting when marked with **GREEN** paint above and below stump height. Individual trees shall be cut so as to leave paint visible on the stump.

(Exhibit G at 181 (¶ 3).)

18. Regarding timber volumes and rates, the prospectus states:

The quality, size and age class of the timber are estimates based upon detailed cruise information on file and available for inspection at the Forest Service offices listed in the advertisement. **INFORMATION LISTED HEREIN IS MADE AVAILABLE WITH THE UNDERSTANDING THAT VOLUMES SHOWN ARE NOT ESTIMATES OF A PURCHASER’S OWN RECOVERY AND ARE NOT A PART OF THE TIMBER SALE CONTRACT.** For these reasons, bidders are urged to examine the timber sale area and make their own recovery estimates.

(Exhibit G at 182 (¶ 4).) Note, this does not state that the detailed cruise information is an estimate; a distinction exists between cruise data (raw information) and estimates (overall quality, size, age class, and volume) derived therefrom. The count or quantity of trees is not described as an estimate.

19. This was a pre-measured, marked sale under which the purchaser would pay a fixed sum; payment was not dependent upon the actual volume of timber removed. This sale contrasts with a scaled sale, under which the contract price is dependent upon the volume of timber removed and measured. (Exhibit JJ at 2 (¶ 8).)

20. For the eleven categories, the prospectus depicts the same estimated volumes as in the sale summary (Exhibits F at 180, G at 182 (¶ 4)). The prospectus contains more detail than the sale summary, in terms of the species and estimated volume of the material (Exhibit G at 182-83 (¶ 4)). The prospectus specifies a contract termination date of August 15, 2003 (Exhibit G at 184 (¶ 5)).

The bid and contract

21. Prior to bidding, Robert J. Cleereman, Jr., partner of and for the purchaser received the detailed cruise information from the Forest Service, visited the site and looked at four or five blocks for log quality. Prior to bidding, the purchaser did not determine the quality and calculate the volume of timber for each sale unit and each species listed in the prospectus. As the purchaser explains: it did not have enough time or money to perform those activities; further, the purchaser notes that the Forest Service already had done them, as revealed in the detailed cruise information. (Exhibit DD at 2 (¶¶ 1-2, 4-5).)

22. The purchaser submitted its bid on a form containing the following provision:

DISCLAIMER OF ESTIMATES AND BIDDER'S WARRANTY OF INSPECTION: Before submitting this bid, bidder is advised and cautioned to inspect the sale area, review the requirements of the sample timber sale contract, and take other such steps as may be reasonably necessary to ascertain the location, estimated volumes, construction estimates, and operating costs of the offered timber. Failure to do so will not relieve bidders from responsibility for completing the contract.

Bidder warrants that this bid/offer is submitted solely on the basis of its examination and inspection of the quality and quantity of the timber offered for sale and is based solely on its opinion of the value thereof and its costs of recovery, without any reliance on Forest Service estimates of timber quality, quantity or costs of recovery. Bidder further acknowledges that the Forest Service: (i) expressly disclaims any warranty of fitness of timber for any purpose; (ii) offers this timber as is without any warranty of quality (merchantability) or quantity; and (iii) expressly disclaims any warranty as to the quantity or quality of timber sold except as may be expressly warranted in the sample contract.

Bidder further holds Forest Service harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.

(Exhibit I at 203 (¶ 23).)

23. The purchaser recognizes that it warranted that it did not rely upon Forest Service estimates of volume and quality of timber, but solely on its own examination and inspection of the timber offered for sale. However, the purchaser relied on the detailed cruise information and the tree counts of species--the Government-collected raw data--in formulating its bid. (Exhibit EE at 3 (¶ 15).)

24. With an award date of September 15, 1998, the Government awarded a contract, No. 027403, to the purchaser (Exhibit O at 212). Under the Northern Pike Timber Sale, the purchaser is required to cut and remove the marked timber in the Iron River Ranger District of the Ottawa National Forest in Michigan (Exhibit O at 212). The award price of the contract is \$299,499.96, comprised of various unit rates for the eleven categories of species and products of timber. (Exhibit O at 218).

25. In paragraph AT2, volume estimate and utilization standards, in addition to other information, the contract repeats the information in the prospectus regarding the estimated quantity for the eleven categories of timber (Exhibit O at 213, FF 15). In paragraph AT5c, schedule of payment units, the contract identifies the quantity of species and products to be paid for at flat rates, and the total payments per item (the estimated volume times the purchaser's rate for that item) and payment unit, of which there are eighteen. The sawtimber volumes total 1091 CCF, the pulpwood volumes total 7759 CCF, and the total volume is 8850 CCF. (Exhibit O at 216-18). These figures contrast with the volume totals in reports L3 and L5 generated by the cruising program: 1325 CCF sawtimber, 7522 CCF pulpwood, and 8847 CCF total. These figures also contrast with the per payment unit figures derived from reports A5 and B1 generated by the cruising program (FF 14). A comparison of the B1 totals and AT5c totals for each payment unit is as follows:

payment unit	B1 total CCF	AT5c total CCF	overstatement (AT5c -B1)	percentage of B1
1	345.62	394	48.38	0.13998032521
2	338.97	357	18.03	0.0531905478
3	287.66	347	59.34	0.2062851978
4	722.75	759	36.25	0.0501556555
5	443.40	475	31.6	0.0712674786
6	552.45	605	52.55	0.0951217305
7	462.49	492	29.51	0.063806785
8	681.01	730	48.99	0.0719372696
9	527.61	588	60.39	0.11445954398

10	172.68	197	24.32	0.14083854529
11	296.80	303	6.2	0.0208894879
12	601.22	654	52.78	0.0877881641
13	458.73	495	36.27	0.0790661173
14	387.06	418	30.94	0.0799359272
15	464.83	526	61.17	0.13159649764
16	473.48	515	41.52	0.087691138
17	506.10	555	48.9	0.0966212211
18	401.60	440	38.4	0.0956175299
total	8124.46	8850	725.54	0.089303166

(Exhibits C at 87-92, O at 216-18.)

26. The contract contains an Adjustment of Volume clause, paragraph CT4.12 (10/96):

A volume estimate shown in AT2 shall be revised by correcting identified errors made in determining estimated volume which results in a change in total sale volume of at least 10 percent or \$1,000 in value, whichever is less, when an incorrect volume estimate is caused by (a) an area determination error, (b) computer input error or computer malfunction, (c) a calculation error.

No adjustments in volume shall be made for variations in accuracy resulting from planned sampling and Measuring methods or judgments of timber quality or defect.

For payment purposes, corresponding revisions in volume and total payment shall be shown in AT5c for each Payment Unit involved. . . . Adjustment in rates will not be made, adjustment in volumes shall not obligate Forest Service to designate additional volume when the original volume estimate is overstated, nor shall the provisions of BT2.41 and BT2.42 apply for changes in volume unless Sale Area map shows Payment Units where Marking or Measuring is to be completed after date of sale advertisement.

(Exhibit O at 245 (¶ CT4.12).)

27. As stated above, FF 1, regarding measuring methods, the contract specifies that the estimated quantity of timber in AT2 has been determined by standard procedures described in Region 9 “FSH 2409.12, Timber Sale Cruising Handbook.” Further, for each of the eleven categories of material,

the timber is said to “have been 100 percent or sample tree-measured” with no category of timber to have been area estimated (Exhibit O at 255 (¶ CT6.8)).

Performance

28. By letter dated January 20, 1999, the purchaser informed the Government that it was in the process of cutting payment unit 9. Having surveyed the remaining acreage of the unit to be cut, the purchaser concluded that it would be at least 175 to 200 cords short of the 575 cords of hardwood pulp estimated in the contract. The letter states: “The major problem we found when checking this block over was the amount of one and two stick [(i.e., 8-foot sections)] trees marked, some of them under contract spec[ification]s that didn’t even contain any merchantable material. Tally trees were never any of these, always seemed to be 5 to 6 stickers.” (Exhibit Q at 264.)

29. The Government responded by letter dated February 9, 1999, stating that it had reviewed the volume printouts and tally sheets and could find nothing that indicated a problem that would be correctable (Exhibit R at 265). On March 3, 1999, the purchaser informed the Government of problems, including not having tally trees marked, poor volume estimation, and having all tally trees only in one area of the payment unit. The purchaser further suggested that tally trees were “made up” and that markers were deliberately selecting only good trees to tally, so as to constitute extreme bias. (Exhibit S at 266.)

30. On May 12, 1999, the Government and purchaser met in the forest. The purchaser pointed out various problems, including for some payment units reviewed by the purchaser, the discrepancy in total trees shown on tally cards and total trees found, and the actual tally trees shown on tally cards and lack of marked tally trees in the payment unit. The Government, through a contracting officer, further summarizes the meeting:

Other problems Bob Cleereman pointed out about tally trees were their location and numbers. The sample trees were invariably clustered near each other, and invariably along the roads. In one unit there were four sample trees of the same strata (1:400 sampling intensity) very close to each other. Three of these sample trees had the same initials, and presumably sampled by the same cruiser. Bob Cleereman reminded everyone that these four sample trees represented 1600 trees within an area that far fewer trees existed. According to Bob Cleereman, almost all sample trees were identified as sample tree 1 or 2. . . .

Problems isolated to certain units also existed. In Unit 7, a sample tree was found on the ground but did not match any tree on the tally cards. In unit 7, a large-diameter aspen was marked as a tally tree and later check cruised. Although this aspen had a large conk about 16 feet from the ground, no defect was given. In unit 6, the tally cards showed 55 aspen while only a total of 17 aspen could be found on the sale--of which 9 were marked. In Unit 16, several dead trees were marked. Also in unit 16 was cruised volume of white birch, even though no white birch sample tree was found on the ground. It was also noted by Bob Cleereman that a small channel

(perhaps an ephemeral stream) had been marked when the marking guides clearly stated the area was to be protected.

(Exhibit T at 268-69.) The same contracting officer notes in a memorandum dated May 20, 1999, to the contracting officer on the disputed contract: “We spent a couple hours in the field reviewing several items of concern he [the purchaser] had. It was apparent that he had done a great deal of work and had reasonable grounds for some of his concerns.” (Exhibit U at 270.)

Claim and dispute

31. By letter dated May 18, 1999, the purchaser submitted a claim to the contracting officer. The purchaser identifies various errors, including inaccurate tree counts, failure to mark tally trees, marking submerchantable trees, inaccurate recording of defects and heights. (Exhibit V.) The purchaser seeks a volume adjustment (a reduction of 30%) and corresponding value adjustment, as well as \$4,857.60 as costs incurred by the purchaser “to determine the degree and extent of the errors discovered during this claim process. Items included in this amount include wages, mileage, and materials used during the field collection of data for this claim. Also included are consulting fees . . . for technical support and field review.” (Exhibit V at 275.)

32. In response to the contracting officer’s request for additional information, the purchaser submitted a modified claim by letter dated June 22, 1999. The purchaser states that it utilizes figures for two payment units--one completed, and one which had minor work remaining, for which it makes adjustments. The purchaser compares the volumes in the contract, paragraph AT5c (FF 25), to its actual volumes, in three categories: sawtimber, aspen pulpwood, and hardwood (including white birch) pulpwood. Its figures for the combined units reveal a volume difference of approximately 23% for sawtimber and 22% for pulpwood. The purchaser states that approximately 8% of pulpwood material represents submerchantable product, such that the proper overstatement is the sum, or 30%. The purchaser seeks a volume reduction of 23% for sawtimber and 30% for pulpwood, with a corresponding adjustment in value. The purchaser also modifies its claim for costs incurred to \$5,607.60, said to reflect additional expenses incurred. (Exhibit Z.) By decision dated July 20, 1999, the contracting officer denied the claim (Exhibit BB).

33. By letter dated October 6, 1999, the purchaser submitted its notice of appeal to this Board. The purchaser states that it intends to show that the errors associated with volume estimates in the sale are the result of numerous and repeated calculation and computer input errors covered under clause CT4.12. Additionally, the purchaser states that it intends to show that the errors propagated by the Forest Service demonstrate gross inadequacy and negligence in compliance with Forest Service standards, guidelines, procedures, and statistical standards. “Calculation and input errors on the [sale] stemmed from improper collection of field data that demonstrates gross negligence of established procedures and statistical soundness.” (Exhibit CC at 331.)

34. In its complaint, dated December 9, 1999, the purchaser seeks to recover \$88,534.54, representing a value adjustment of \$78,164.53 for the volume adjustment of 23% for sawtimber and 30% for pulpwood, and \$10,370.01, said to be its expenses incurred as a direct result of the claim. Although the purchaser has not placed supporting information into the evidentiary record regarding

its claimed expenditures, the Government, which had the opportunity to engage in discovery, has not attempted to discount the accuracy of the figure as containing other than compensable costs. However, the claimed costs increased between the modified claim (FF 32) and the complaint. The record does not demonstrate that the \$4,762.41 (= \$10,370.01 - 5,607.60) increase of expenses reflects other than costs incurred in pursuit of this litigation; that is, the costs were incurred after this appeal was filed to develop the record in this matter. The Board finds that the purchaser incurred costs of \$5,607.60 prior to filing its appeal in its attempt to demonstrate the Government’s errors.

Subsequent count and Board conclusions

35. In August 2000, the Forest Service conducted a “recount” of trees marked in payment unit 4. Cruisers were instructed to count marked trees within the payment unit and record marked trees by the cruise design sample groups. Further, the instructions dictate:

Locate all tally trees. Record tally and cruiser initial. Ribbon the tree securely and write an identification number on the ribbon which corresponds to the line number on the tally card. Assign only one cruiser to record tally tree information. Mark approximate location of tally trees on the map provided.

(Exhibit JJ, Attachment at 1.) The Government has not presented the results of the tally tree count for inclusion in the evidentiary record. This lack of proof by the Government serves to support the purchaser’s contentions that a significant number of the tally trees were not identified, particularly with the observations in the forest by the Government and purchaser (FF 30).

36. Regarding the recount of trees, the Government presents the following results:

sample group	original	recount
1 (hardwood pulp)	7592	6310
2 (hardwood pulp)	81	364
3 (sugar maple sawtimber)	124	229
4 (sugar maple sawtimber)	40	30
5 (yellow birch sawtimber)	27	39
6 (yellow birch sawtimber)	0	0
7 (other hardwood saw’r)	134	212
8 aspen (5-10.9")	0	6
9 aspen (11.0+ ”)	29	31
10 fir	0	0
TOTAL	8027	7221
submerchantable	0	78
dead	0	80
outside unit	0	2
totals	0	160

(Exhibit JJ, Attachment at 4.) The Government has provided no support for the credibility of its figures--the total numbers or the variations in the pulpwood and sawtimber classifications from the initial cruise. The Regional Timber Measurement and Valuation Specialist for the region suggests that the variations “serve[] to demonstrate the difficulty in ‘estimating’ the number of trees; with three different attempts to count the trees, each coming up with different values.” (Exhibit JJ at 6 (¶ 24).) Although it may be difficult to count a finite number of trees, such that a number represents an approximation because of recognized observation and counting errors, a premise of the methodology is an accurate tree count; the tree count is a fundamental or basic element in any volume calculation (FF 2-4). The significant variations in results between the initial cruisers and the recount of this one payment unit, without any assurance that the recount is more accurate than the purchaser’s figures, serve to demonstrate the inaccuracy of the total number of trees and species used by the Government in its volume calculations.

37. The Government represents that 9.5 person days were utilized to recount the payment unit covering approximately 56 acres, which it equates to 6 acres per person day. For the 781 acres of this sale, the Government concludes that it would take approximately 130 person days, which at the daily rate of \$150 per marker, would cost \$19,500. (Exhibit JJ, Attachment at 6).

38. The record demonstrates that the data on the tally tree cards used in the volume estimates is not accurate or correct, in part, and is not verifiable, at least in part, because trees were not identified. The check cruise itself demonstrates that some of the data is inaccurate. The Government’s recount further undermines the credibility of the initial cruise, and demonstrates other inaccuracies. The purchaser has assembled credible data, verified, in part, by a walk-through with the Government (FF 30).

39. Given the record as a whole, the Board finds the raw data of the initial cruisers and check cruiser to be inaccurate and unreliable. The Board finds that the purchaser’s figures for the volume of timber removed are credible. Without better evidence in the record, or reason to believe that the two payment units are not reasonably representative of the sale as a whole, the Board concludes that the sawtimber volume is overstated by 23% and the pulpwood volume is overstated by 30%, in each of the eleven categories in AT5c (FF 25, 30, 32).

DISCUSSION

To summarize the process of this measured (not scaled) sale, the Government cruised the sale area, conducting what it described as a 100% tree count with sampling. Based upon the data obtained from the initial (not check) cruise, it derived volume estimates utilized in the sale and contract. The contract price is determined by summing the product of the various estimated volumes and the contracted unit prices. Under the contract, the purchaser obtains the marked timber on the sale and is to pay the fixed price, without regard to the actual volume removed, with a variation in the fixed price to occur under the Adjustment of Volume clause only if various conditions are satisfied.

The purchaser maintains that the Forest Service breached its standards and procedures during the preparation of the sale, and that the volume estimates were grossly inadequate and negligently prepared. The purchaser seeks a correction in the volume estimates under the Adjustment of Volume clause (because of input and calculation errors) and under a breach of contract theory (because the Government failed to follow the procedures described in the handbook, and because of negligence and other lapses). The Government maintains that relief is not available because of the Government disclaimers and affirmative statements of the purchaser.

Disclaimers and affirmative statements

The prospectus and contract contain Government disclaimers against a warranty of the estimates. The bid and contract contain affirmative statements by the purchaser that it based its bid upon its own calculations of timber quantity and quality. (FF 15, 18, 22.) Some of the limitations of the disclaimers and warranty of inspection clauses have been addressed by the United States Court of Federal Claims:

In relying on the prior Gregory [Lumber Co. v. United States, 230 Ct.Ct. 1041 (1982)] decision, and that in the Webco [Lumber, Inc. v. United States, 230 Ct.Cl. 457, 677 F.2d 860 (1982)] case, it must not be overlooked that neither [of] those decisions, nor this opinion, rest upon the blanket conclusion so often asserted by the defendant in this litigation that regardless of the facts--i.e., the degree or circumstances of any bad faith, misrepresentation, or unconscionability--the contract disclaimers and plaintiff's warranty of inspection nonetheless entitle defendant to judgment as a matter of law. We do not read the case law of this court and our predecessor court to support such a holding. Rather, as we explain in more detail, infra, the need to consider such a hypothesis, on the merits, does not arise in this litigation, and it did not arise in the prior Gregory decision, or the Webco case. But rather, because of the total absence in this case of specific material facts sufficient to even raise such issues as bad faith, misrepresentation, or unconscionability beyond the category of mere allegations, they do not form a part of the factual predicate upon which our decision turns, infra.

Gregory Lumber Co. v. United States, 11 Cl.Ct. 489, 501 (1986), aff'd (Fed. Cir. Sept. 1, 1987) (non-precedential). In the referenced Webco opinion, that court stated that "the various documents in this case on their face show that the contract did not make any warranties regarding the quantity of timber to be recovered under the plaintiff's contract." 230 Ct.Cl. at 464. In contrast, although this contract does not warrant the quantity of timber to be recovered, this contract does assert that the detailed cruise information was collected in accordance with the provisions of the handbook and was available for review by prospective purchasers; therefore, although the quantity of timber was not warranted, basic data was provided to the purchaser as representative of the trees and as having been ascertained utilizing, and within the accuracy of, the methodologies described in the handbook. Separately, through the Adjustment of Volume clause, the contract directs that volume estimates will be corrected in particular circumstances, without regard to the quantity of timber recovered. Given

the terms of the contract and the allegations of this purchaser, the facts compel the Board to explore the reach of the disclaimers and warranty.

Although the disclaimers and affirmative statements limit a purchaser's ability to recover, the clauses do not exist in isolation, or override the rest of the contract. The contract dictates the obligations of the parties. This purchaser seeks relief under the Adjustment of Volume clause, CT4.12 (FF 26), which is part of the contract and must be read together with the disclaimers and affirmative statements. The clause directs that identified errors made in determining estimated volume shall be corrected when the incorrect volume estimate (of at least a given threshold, here satisfied) is caused by computer input error or a calculation error, or other specified errors. Any adjustment under the clause is to be made without regard to purchaser representations and Government disclaimers (and without regard to the actual volume of timber removed); the adjustment is based upon the correction of demonstrated error. This purchaser also seeks relief for breach of the contract which states that the Government conducted the cruise and determined the estimated volumes in accordance with the provisions of the handbook (FF 27). This theory of relief is also contractually based, and thus not limited by the disclaimers and affirmative statements.

The Government's attempt to broadly apply its disclaimer language also runs contrary to the express language of the disclaimers, which recognize a purchaser's ability to obtain relief as expressly warranted against in the sample contract (which provides the bases for relief raised by this purchaser) (FF 18, 22, 26). Further, the prospectus expressly encourages prospective purchasers to review the appraisal and the other information regarding the timber (FF 16). Nothing suggests that the detailed cruise information, the raw data collected (number of trees and species, for example), is meaningless or unreliable or was itself not based on actual measurements. To the contrary, the contract assures that the Government utilized the standard procedures of the handbook in obtaining the data (FF 27).

The contract and prospectus do not suggest that a prospective purchaser need verify the number of trees counted by the cruisers or the existence of the tally trees which were to be marked and identified, and which were check cruised. Given the time frame and costs of conducting a cruise, nothing in the practice of the industry revealed in this record suggests that a prospective purchaser would (or would be expected to) verify the detailed cruise information. This purchaser credibly notes that it lacked the time and resources to cruise the sale area prior to bid or award (FF 21); the Government's recount information supports the purchaser's contentions that the time and expense of such an endeavor would not be insubstantial (FF 37). Further, particularly given that the check cruiser concluded that the initial cruise was statistically valid, the record does not demonstrate that the purchaser did discern, or would or should have discerned, any discrepancies or Government inaccuracies during the purchaser's pre-bid inspection of the forest. In the detailed cruise information, the Government made representations within the accuracy of the handbook.

Previously, in considering relief requested by a purchaser under the Adjustment in Volume clause, the Board stated:

Here, we are not dealing with an error in counting or calculation, but rather with an alleged difference in result from an extrapolation using a particular methodology vis-a-vis the actual timber quantity. Here, the FS used the cruising method then in practice. Both the FS and Appellant were aware that such method could have resulted in an estimated timber volume well in excess of or well below the specified number.

Doug Jones Sawmill, AGBCA No. 94-193-1, 96-1 BCA ¶ 28,176 at 140,656. In contrast, in the present case, the purchaser asserts (and has demonstrated) an error in counting and calculation, while the extrapolation and methodology of determining timber volume estimates are not at issue.

The facts and legal contentions in the present situation also are distinct from those found in Lance Logging Co., AGBCA Nos. 98-137-1, et al., 01-1 BCA ¶ 31,356, appealed, No. 01-1265 (Fed. Cir. docketed Mar. 21, 2001). There, the variations in quantities were attributable to the methodology used in the calculations, for which the contracts expressly placed the risks of variations on the purchaser. Here, the purchaser does not dispute the methodologies of estimating timber volume. Rather, it maintains that the detailed cruise figures from which the estimates were derived were faulty--that is, the cruise information reflects trees which do not exist, such that input and calculation errors existed and are correctable under the contract. Further, the purchaser premises its breach theory on the Government's failure to follow the provisions of the handbook in collecting and utilizing the data. Both theories of relief arise under the contract and are not precluded by the disclaimer or affirmative language. The disclaimers do not shift all risks to the purchaser.

Adjustment of Volume clause

The Adjustment of Volume clause of the contract expressly provides for the correction of input and calculation errors (FF 26). The volume estimates here were based upon inaccurate tree counts and sample tree data (species, diameter, height, defects, products). Incorrect or erroneous data was input into the equations, this resulted in erroneous calculations and inaccurate volume estimates.

The tree counts are inaccurate significantly (FF 28, 30, 36, 39). The numbers of trees to be cut are represented through the contract, in the prospectus, not as simple, calculated or derived estimates, but as the actual number of trees counted by cruisers. While 100% accuracy is not assured, the record demonstrates significant error in counting the trees to be cut. A Government recount of one payment unit reveals that the original cruisers overcounted the total number of merchantable trees in the unit by ten percent, with far greater percentage variations in the number of trees in the particular sample groups.

The tally or sample tree information utilized in the volume estimates is not accurate; the tally tree information does not reflect the actual conditions in the forest. The tally card records of numbers, species, size (diameters and heights) and percentages of defects are not reliable, and cannot be traced to unmarked trees (FF 7-8, 10-13, 28, 30, 35). Moreover, none of the check cruise data (reflecting differences in diameter, height, and defects, for example) was utilized in determining the volume

estimates, although the check cruise data was to be more accurate than the initial cruise data. This evidences another instance of input and resulting calculation errors.

The volume estimates in the contract used for payment purposes were derived utilizing a sample-tree with a complete tree count methodology (that is, extrapolating data regarding sampled trees to the total tree count). The inaccurate tree counts and inaccurate sample tree information reflect input errors in the volume estimation equations and calculation errors in the volume estimate results. That is, without accurate data to input into equations to generate volume estimates (FF 4), input errors and calculation errors resulted.

The Adjustment of Volume clause expressly provides for the correction of inaccurate volumes; despite the assertions of the Government, the contract does not serve as a bar to relief. In finding entitlement for a purchaser's request for relief under the same clause, this Board has stated:

Under the Government's interpretation of the clause, if the data being entered is incorrect, but the data is entered correctly, no recovery is warranted. We do not construe the term "computer input error" as narrowly. Nor is there anything in the clause or the contract which warrants such a construction. We conclude that a computer input error can result from incorrect input data (i.e., tree count) as well as entering such data incorrectly. Further, based upon our conclusion above that an error in the tree count exists, the error would be a "calculation error" (summation or counting the same trees twice) which would also be covered by CT4.12.

K&K Logging, Inc., AGBCA No. 85-271-3, 85-3 BCA ¶ 18,487, at 92,852.

The clause demonstrates that the contract did not place upon the purchaser the risks associated with the inaccurate volumes here. However, the underlying actions of the Government in its conduct of the cruise and check cruise (that is, the gathering of the raw data), merit exploring the purchaser's allegation of breach and request for relief apart from that permitted in the Adjustment of Volume clause (solely adjusting volumes only when a threshold is met).

Breach

While the Adjustment of Volume clause provides a basis for some relief, a separate basis, breach of contract, has been raised and demonstrated here, thereby enabling the purchaser to recover without the restrictions of the Adjustment of Volume clause. In alleging breach, this purchaser asserts that the Government failed to follow its written procedures and standards in preparing the timber sale, and that such violations merit the relief it seeks--a correction of volumes and recovery of its costs incurred in demonstrating such errors.

The Government represented detailed cruise information as having been ascertained in accordance with the dictates of the handbook, which provides specifics regarding the methodology of obtaining, and the statistical reliability of, the data (FF 27). The assurances of the handbook are not inconsequential, as the detailed cruise information is the sole material presented to prospective purchasers without a specific disclaimer of any reliability. The cruise errors had a material impact

on the purchaser's assessment of the volume of timber to be removed and on the tree volumes used in the line items upon which the competition and award rested. The cruise data, which did not reflect actual trees, was not statistically reliable within the dictates of the handbook.

Contrary to the contract, the cruisers (initial and check) significantly deviated from the handbook in collecting the detailed cruise information. The cruisers did not count the actual trees; the tree count is not reasonably reflective of the merchantable trees to be cut. By the Government's own recount of one unit, the figures in various sample groups are inaccurate by much greater than the 10% total overestimate of the count. Data for tally trees was made up. The cruisers did not identify a substantial number of tally (or sample) trees, making it impossible to conduct a meaningful (as prescribed by the handbook) check cruise. The cruisers did not select tally trees in accordance with the dictates of the handbook. The cruisers acknowledge (and the Government recount bears out) that submerchantable trees were counted as merchantable trees. (FF 2-3, 7-8, 10-14, 28-30, 35-36, 38.)

The check cruiser found errors in the initial cruise. The check cruiser did not factor into his analysis of accuracy that data marked on trees was not legible. Had the check cruiser included a zero volume for the initial cruise compared to his volume estimates for three (the minimum of "several") trees, the percentage variation out of eight-five or eighty-eight trees would have been outside of the statistical accuracy required. (FF 12.) Further, no adjustment or inquiry was made for observed trees which were improperly marked because outside of boundaries or submerchantable. These factors should have alerted the Government to an inaccuracy before the prospectus was issued.

The significant and substantive cruise errors reflect something more fundamental than the correctable errors enunciated in the Adjustment of Volume clause. The actions reflect a disregard for and a deviation from material requirements of the handbook. While a purchaser under a timber sale contract assumes certain risks, the purchaser does not assume the risk that the Government largely has disregarded the dictates of the handbook, which are to provide some assurance of accuracy within statistically sound parameters, in obtaining detailed cruise information. The sale was not prepared or administered following established procedures. The Government's actions represent a material breach of the contract and run contrary to the terms and conditions of the timber sale. While every Government failure to follow a procedure of the handbook is not material and every failure by the Government does not enable a purchaser to relief for breach, this case involves specific, overwhelming facts. The detailed cruise information provided for the sale was not ascertained in accordance with the handbook procedures and is not validated by the actual trees existing in the forest. The Board concludes that the Government materially breached the contract by not following the handbook procedures and by providing detailed cruise information (on which the purchaser reasonably relied) which was not accurate or meaningful within the dictates of the handbook.

It is incorrect to conclude that this breach claim is precluded because of the relief afforded under the Adjustment of Volume clause (although the Government did not raise this theory as a defense). It has been stated that a claim remediable under a contract clause is not a breach and cannot be remediable as a breach. Johnson & Sons Erectors Co. v. United States, 231 Ct.Cl. 753, cert. denied, 459 U.S. 971 (1982). However, the breach claim here is not remediable under the Adjustment of

Volume clause. The purchaser seeks relief apart from that afforded under the clause--the recovery of its expenses incurred in demonstrating the breach. The violations at issue under the claim of breach relate to the Government's failure to follow the handbook procedures and the fact that the Government materially misrepresented the detailed cruise information underlying the sale. Those violations are the fundamental errors; the input and calculation errors are but consequences.

The language in the Adjustment of Volume clause cannot properly be read to cover the purchaser's breach claim, and that clause cannot properly be read as the exclusive remedy available to a purchaser regardless of the actions of the Government. Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336, 1342 (Fed. Cir. 2000) ("the narrow specified relief available under the excusable delays provision would fall far short of the relief necessary adequately to compensate [the contractor] for the damages it alleges it suffered from the government's breach of the contract"). To disallow (as opposed to reaching the merits of) this breach claim, results in the Adjustment of Volume clause providing the exclusive remedy under the contract for the claims asserted. Such a conclusion is inconsistent with the language of the clause and contract. Thus, unlike the situation addressed in Triax-Pacific v. Stone, 958 F.2d 351 (Fed. Cir. 1992), the contingencies contemplated under the Adjustment of Volume clause are not the contingencies which arose here. That is, that clause requires the correction of errors affecting volume estimates without altering the representation that detailed cruise information was obtained in accordance with the dictates of the handbook; the clause does not address (or contemplate) a material misrepresentation of detailed cruise information.

The Adjustment of Volume clause addresses volume adjustments and correctable errors, it does not expressly provide (or disallow) any remedy for breach. The relief available under the clause (given the thresholds and limited adjustments permitted) is different from the relief available if the Government breached the contract. For example, a significant overstatement of volume in a contract, arising because of misrepresented detailed cruise information, may compel a purchaser to not complete the sale. Such an option is not available under the Adjustment of Volume clause; it is available if the Government materially breached the contract. Further, costs incurred in demonstrating an error under the Adjustment of Volume clause are not addressed as available relief; once breach is established, the costs incurred in demonstrating a Government breach are recoverable as foreseeable costs which would not have been incurred but for the breach. This breach claim is something different than the claim under the Adjustment of Volume clause (which has threshold limits on its applicability); even if the relief requested largely overlaps, it does not fully coincide. Therefore, the purchaser may independently pursue its claim of Government breach.

To conclude otherwise makes the Adjustment of Volume clause a disclaimer of both the reliability of the detailed cruise information and the statement that the handbook procedures were followed. Contract interpretation does not permit such an implied disclaimer to benefit the drafter of the contract clauses, when no express disclaimer exists. Separate causes of action exist for relief under the Adjustment of Volume clause and for breach of the contract.

Relief

Given the breach of the contract by the Government and the erroneous volume estimates used for payment purposes, the purchaser is entitled to a correction in the volume estimates used in the contract. The Board has concluded that the volume estimates in the contract overstate the sawtimber volume by 23% and the pulpwood volume by 30%, distributed equally over the categories and payment units in AT2 and AT5c (FF 39). Therefore, the purchaser is entitled to such a contract adjustment reflecting the change for payment units already cut and to be cut. This amounts to a total price adjustment in the contract price of \$78,164.53, as requested by the purchaser.

Given the breach of contract by the Government, the purchaser is entitled to recover its reasonable, foreseeable costs incurred because of the Government's breach, here the costs of obtaining supporting information, preparing various reports, and of perfecting its claim underlying this matter to demonstrate the Government's errors. But for the breach, such efforts would not have been necessary. However, a purchaser's ability to recover its costs of litigation against the Government, in an administrative forum, is expressly limited by statute, 5 U.S.C. § 504 (the Equal Access to Justice Act), as well as by the American rule and sovereign immunity. A request for relief under the Act has not been presented to the Board (any such filing would appropriately occur only subsequent to this decision). Having prevailed on its theory of breach, the purchaser is entitled here to recover its costs incurred which are not costs of litigating against the Government. Those costs are \$5,607.60 (FF34).

The dissent

The dissent is misguided in construing the contract. The contract does not place on the purchaser the risk of cruise errors that occurred in this situation. The detailed cruise information is not presented as an estimate; rather, it is said to have been ascertained in accordance with the dictates of the handbook. While a portion of a cruise does involve the exercise of judgment (and it is recognized that different cruisers may obtain different information for the same trees and/or may select different sample trees during the cruise), the specific information is to be gathered in accordance with the dictates of the handbook and within specific statistical tolerances. Thus, the disclaimer of estimates by the Government does not affect or alter its representations regarding the detailed cruise information, which is not such a disclaimed estimate (although the information derived therefrom is).

As explained above, the Adjustment of Volume clause is a remedy granting clause, but it is not an exclusive remedy granting clause which shields the Government from any improprieties in the conduct of the cruise underlying the timber sale. The clause is limited in its applicability because of thresholds and in terms of the relief available. The clause does not state that it provides a purchaser the sole means of relief, or suggest that the accuracy of the underlying detailed cruise information is other than as represented in the handbook and cruise data.

The dissent considers the bid form disclaimer and states, "Whether such clause would be construed as exculpatory in situations such as misrepresentation or bad faith is not presently before the Board." The dissent seemingly chooses not to address the purchaser's claim of breach, which raises

allegations of misrepresentation and bad faith, or concludes that the Adjustment of Volume clause provides the exclusive method of relief, such that the question is moot.

Sadly, for potential purchasers, who derive a livelihood from the purchase and resale of timber, and the Forest Service, which is under a statutory obligation in administering forests of this country, the dissent sends a message that any information provided regarding a timber sale cannot be relied upon and that the handbook does not serve as a benchmark for the conduct of the Forest Service. The analysis of the dissent suggests that the Forest Service lacks standards in selling timber enforceable by purchasers, such that the Forest Service may not know what it is selling or the value thereof, and a purchaser is simply buying timber on an “as is” basis with little reliable information from the Forest Service regarding the sale. Fortunately, such views are in the dissent.

DECISION

The purchaser has demonstrated its entitlement to relief. The Board grants in part the appeal. The purchaser is entitled to the requested contract price adjustment of \$78,164.53. The purchaser also recovers \$5,607.60, its expenses incurred prior to this litigation. The Government is to pay interest as provided in the CDA, 41 U.S.C. § 611.

JOSEPH A. VERGILIO

Administrative Judge

CONCURRING OPINION BY ADMINISTRATIVE JUDGE WESTBROOK.

I concur in the facts as found and the result reached by the presiding judge. I reach that conclusion based on different reasoning which I set out below.

The general rule is that where relief is available under the contract, recovery is not also available on the basis of breach or equitable grounds. Johnson & Son Erectors Co., ASBCA Nos. 23689, 24564, 81-1 BCA ¶ 14,880, aff'd on recon., 81-1 BCA ¶ 15,082; 231 Ct. Cl. 753, cert. denied, 459 U. S. 971 (1982); Triax-Pacific v. Stone, 958 F. 2d 351 (Fed. Cir. 1995) (“contingencies contemplated by various contract clauses are remediable under those clauses of the contract, not as a breach of contract”). Where a contractor’s claim is redressable under the contract, boards of contract appeals have followed this general rule to compensate the contractor in that manner. Worsham Constr. Co., ASBCA No. 25907, 85-2 BCA ¶ 18,016; Softwear Design, ASBCA No. 23616, 83-2 BCA ¶ 16,703; Hardrives, Inc., IBCA Nos. 2319, et al., 93-2 BCA ¶ 25,669.

I disagree that Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336, 1342 (Fed. Cir. 2000) provides authority to compensate Appellant for its claim for a contract amount reduction as a breach rather than under the clause. That case is distinguishable from the appeal now before the Board. The court there, in construing a non-Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, instrument found that the Government’s reliance on the avoidable delays clause in the contract was misplaced because that clause involved routine delays which might arise during

performance of a contract and not a complete failure by the Government to commence performance at all. The Government's failure to commence performance at all and its statements that it might not provide services until 2010 or later that it was contractually required to start providing in 1998 resulted in a claim far broader than one for improper delays in performing contract obligations. Moreover, the clause in question provided relief of a limited nature ("the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay"), inadequate to compensate the contractor for the additional expenses it incurred to store nuclear waste material which the Government had contracted to dispose of.

Here the possibility that volumes of timber cut might vary 10% or more from that anticipated is provided for by the Adjustment in Volume clause. Thus, Appellant's claim for its requested contract price reduction exceeding 10% is remediable under the contract. Provided the conditions of the clause are met, as we have found, no reason exists to look behind the need for adjustment to discover the reasons why. Appellant's claim for a contract price reduction can be fully remedied under the Adjustment in Volume clause and I would therefore equitably adjust the contract in the amount of \$78,164.53 pursuant to the clause.

The Adjustment of Volume clause, however, neither provided nor prohibited compensation for Appellant's claim for expenses of investigation to determine the reasons for and extent of the shortfall in volume. The Forest Service (FS) failed to conduct the cruise according to the Forest Service Handbook (FSH) as required by the contract. Subsequently, it also failed or refused to undertake any investigation to discover why Appellant experienced a significant shortfall in timber harvested. Instead, notwithstanding this Board's prior decision in K & K Logging, Inc., AGBCA No. 85-271-3, 85-3 BCA ¶ 18,487, the FS relied on contract disclaimers to the exclusion of other pertinent contract language. The action and inactions of the FS in its conduct of the cruise and check cruise as detailed in the opinion by the presiding judge, were of such a nature as to constitute breach.

Where there is a remedy granting clause providing only a partial remedy, there is authority under various circumstances for a party to recover costs not payable under the contract, as a breach of the contract. PAE International, ASBCA No. 45314, 98-1 BCA ¶ 29,347, citing United States v. Utah Construction & Mining Co., 384 U.S. 394, 402 (1966) ("when only partial relief is available under the contract . . . the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract"). In denying a motion for partial summary judgment on two of the four claim components in a contractor's Request for Equitable Adjustment, the Armed Services Board of Contract Appeals in Marine Hydraulics International, Inc., ASBCA No. 46116, 94-3 BCA ¶ 27,057, held that a contractor could seek costs unrecoverable under the Government Delay of Work clause on the theory of common-law breach of contract provided that the clause in question contained no prohibition against recovery of such costs on any basis. The Adjustment of Volume clause in this contract contains no language which can reasonably be interpreted to foreclose recovery of the investigation expenses sought by Appellant here.

Thus, while I find Appellant's basic claim for a contract price reduction properly payable under the Adjustment of Volume clause as stated above, I would allow recovery of the \$5,607.60 in pre-litigation investigatory expenses as damages for breach of contract.

ANNE W. WESTBROOK

Administrative Judge

OPINION BY ADMINISTRATIVE JUDGE HOURY CONCURRING IN PART AND DISSENTING IN PART.

The majority, in disparate and inconsistent opinions, rely on case law that is readily distinguishable from the present facts to depart from well established legal precedent. I concur with the facts and the result that Appellant should recover the \$78,164.53 portion of its claim, but only pursuant to the provisions of remedy granting clause CT4.12, Adjustment of Volume. The clause provides that "A volume estimate shown in [the contract] shall be revised by correcting identifiable errors made in determining [the] estimated volume . . . when an incorrect volume estimate is caused by . . . (b) computer input error or . . . (c) a calculation error." The Adjustment of Volume clause defines how the contract shared the risk of cruise errors used to determine the estimated volumes in the contract, and this risk sharing extended only to the \$78,164.53 which was derived by revising the incorrect estimated volumes. The risk sharing simply does not extend to the additional amount of \$5,607.60 in claim preparation expenses allowed by the majority that arose from the same cruise errors.¹ Accordingly, the precedent established by the majority should not be followed.

I dissent from the majority's decision to award the additional amount of \$5,607.60 for costs allegedly incurred by Appellant "prior to filing its appeal in its attempt to demonstrate the Government's errors." (Finding of Fact (FF) 34.) Contrary to the presiding judge's rationale supporting recovery under a breach of contract theory, the fact that the contract recites that the estimates were to be derived by use of procedures described in the Forest Service Timber Cruising

¹ Depending upon the nature and proof supporting the claimed expenses, it is possible that at least some portion of the \$5,607.60 could be recovered under the Equal Access to Justice Act, if the Government's position was not substantially justified.

Handbook, a handbook for internal Forest Service guidance, grants no breach of contract rights to Appellant, particularly here, where there is a specific remedy granting clause, and where the contract disclaimers hold the Forest Service harmless for such errors “except as expressly warranted against in the . . . contract.” The only express warranty in the contract is the Adjustment of Volume clause, which does not provide for recovery of claim preparation costs.

The appeal arose under Contract No. 027403 between the Forest Service, U. S. Department of Agriculture, and Cleereman Forest Products of Newald, Wisconsin (Appellant). The contract was for the sale of estimated quantities of various species of timber on 18 separate payment units, totaling 781 acres, for a fixed price of \$299,499.96 that was based upon Appellant’s high bid.² The contract was awarded in 1998 and the performance extends into 2003. Based upon the completion of logging on payment units 9 and 14, and a sampling of seven other payment units, Appellant claimed \$78,164.53, representing a reduction in the volume in the anticipated actual volume recovery from the estimated volume, based on errors in the Forest Service cruise. Appellant also claimed \$5,607.60 in costs incurred to demonstrate the Government’s error’s. The Forest Service denied Appellant’s claim and Appellant filed a timely appeal. The evidence supporting Appellant’s claim showing the extent and effect of the cruise errors, and the \$78,164.53 claimed, is more persuasive than the Forest Service evidence showing that the timber volume under-run was within the tolerances of the Adjustment of Volume clause, and therefore, not compensable. On this basis I would grant recovery of the \$78,164.53.

Resolution of this appeal turns on contract interpretation of the following three provisions included in the presiding judge’s opinion, which are set forth below for the convenience of the reader. The Prospectus contained the following disclaimer:

The quality, size and age class of the timber are estimates based upon detailed cruise information on file and available for inspection at the Forest Service offices listed in

² The minimum acceptable bid was \$293,265.23 (Appeal File (AF) 180). The only other bidder bid \$294,232.80 (AF 204), \$5,267.16 less than Appellant’s high bid. The profitability of the sale based on the price of the timber at the mill, after logging and hauling costs are added, is not apparent from the record.

the advertisement. **INFORMATION LISTED HEREIN IS MADE AVAILABLE WITH THE UNDERSTANDING THAT VOLUMES SHOWN ARE NOT ESTIMATES OF A PURCHASER'S OWN RECOVERY AND ARE NOT A PART OF THE TIMBER SALE CONTRACT.** For these reasons, bidders are urged to examine the timber sale area and make their own recovery estimates.

Appellant's bid form also contained the following disclaimer:

DISCLAIMER OF ESTIMATES AND BIDDER'S WARRANTY OF INSPECTION: Before submitting this bid, bidder is advised and cautioned to inspect the sale area, review the requirements of the sample timber sale contract, and take other such steps as may be reasonably necessary to ascertain the location, estimated volumes, construction estimates, and operating costs of the offered timber. Failure to do so will not relieve bidders from responsibility for completing the contract.

Bidder warrants that this bid/offer is submitted solely on the basis of its examination and inspection of the quality and quantity of the timber offered for sale and is based solely on its opinion of the value thereof and its costs of recovery, without any reliance on Forest Service estimates of timber quality, quantity or costs of recovery. Bidder further acknowledges that the Forest Service: (i) expressly disclaims any warranty of fitness of timber for any purpose; (ii) offers this timber as is without any warranty of quality (merchantability) or quantity; and (iii) expressly disclaims any warranty as to the quantity or quality of timber sold except as may be expressly warranted in the sample contract.

Bidder further holds Forest Service harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.

The contract contained the following Adjustment of Volume clause:

A volume estimate shown in AT2 shall be revised by correcting identified errors made in determining estimated volume which results in a change in total sale volume of at least 10 percent or \$1,000 in value, whichever is less, when an incorrect volume estimate is caused by (a) an area determination error, (b) computer input error or computer malfunction, (c) a calculation error.

No adjustment in volume shall be made for variations in accuracy resulting from planned sampling and Measuring methods or judgment of timber quality or defect.

For payment purposes, corresponding revisions in volume and total payment shall be shown in AT5c for each Payment Unit involved. . . . Adjustment in rates will not be made, adjustment in volumes shall not obligate Forest Service to designate additional

volume when the original volume estimate is overstated, nor shall the provisions of BT2.41 and BT2.42 apply for changes in volume unless Sale Area map shows Payment Units where Marking or Measuring is to be completed after date of sale advertisement.

Cruises provide estimates of various timber specie volumes the accuracy of which, even in the absence of errors, depends upon the cruise methods, sampling strategy and techniques, and cruiser training and experience. The cruise becomes a part of the timber appraisal establishing the minimal acceptable bid prices. Proper management dictates that the expense of a cruise should be balanced against the potential revenues from the sale. Cruise estimates will vary from the actual volume by a plus-or-minus tolerance, within a certain probability. For example, a cruise might be relied upon to be accurate to within plus-or-minus 15% of the actual volume, but only 80% of the time. For the remaining 20%, the accuracy can vary greater than plus-or-minus 15%. The Prospectus disclaimer protects the Forest Service from variations from the estimated volume that are inherent to the cruise itself. However, this disclaimer does not protect the Forest Service from mistakes it makes in conducting the cruise. K & K Logging, Inc., AGBCA No. 85-271-3, 85-3 BCA ¶ 18,487.

The disclaimer appearing as a part of the bid form is broader in scope and more troublesome to interpret than the disclaimer in the Prospectus. The bid form disclaimer specifically “holds the Forest Service harmless for any error, mistake, or negligence regarding estimates except as expressly warranted against in the sample contract.” Whether such clause would be construed as exculpatory in situations such as misrepresentation or bad faith is not presently before the Board.³ The question nevertheless occurs that if a timber purchaser cannot rely upon Forest Service timber volume estimates, what use is made of these estimates, and for whose benefit are they prepared. This issue was addressed in American Forest Products Company, AGBCA No. 79-179-1, 85-1 BCA ¶ 17,720, where we stated:

The purpose and need for Forest Service appraisals is based upon statutory and regulatory requirements. Under 16 USC 472a, in order to effectuate the purposes of the Multiple Use Sustained-Yield Act of 1960 (16 USC 528-531) and the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 USC 1600-1614), the Secretary of Agriculture is authorized to sell timber pursuant to regulations prescribed therefor, at not less than the appraised value. Regulations governing the sale and disposal of timber are set forth in 36 CFR § 223. Timber offered for sale generally may not be sold for less than the appraised value or minimum stumpage rates (base rates), whichever is higher. 36 CFR § 223.4(b). Stumpage value is the residual value determined by subtracting from the selling value of the products normally manufactured from the timber offered for sale, the sum of estimated operating costs, including slash treatment and road construction or other

³ It is noted that Government bad faith in a termination for default resulted in the usual remedy of a conversion to a termination for convenience, rather than breach of contract damages. Libertatia Associates, Inc. v. United States, 46 Fed. Cl. 702 (2000).

developments necessary for removing the timber, and margins for profit and risk. Costs are those of an operator of average efficiency. 36 CFR § 223(a). It is clear that the requirement for an appraisal is to ensure that the public receives fair value from the sale of timber. No direct benefit is conferred on timber purchasers from the statutory and regulatory requirements for the preparation of appraisals.

Thus, even if the Forest Service Timber Cruising Handbook, an internal Forest Service document for the guidance of the Forest Service, rose to the level of a regulation, which it does not, the handbook would nevertheless not provide the contractor with any breach of contract rights, unless the regulation can be shown to have been promulgated for the benefit of the contractor. Freightliner Corp. v. Caldera, 225 F.3d 1361 (Fed. Cir. 2000); American Tel. & Tel. v. United States, 48 Fed. Cl. 156 (2000). This handbook obviously was not promulgated for contractors' benefit. Further, there is always at least an implied warranty that the Government's specifications are suitable for their intended purposes. United States v. Spearin, 248 U.S. 132 (1918). The fact that contractual reference to the handbook created an express warranty fails to provide additional contractual rights where the handbook was not promulgated for contractors' benefit, and where, as here, there is a remedy granting clause.

Regarding the remedy granting clause, relief on the basis of breach of contract is not available where a remedy granting clause exists. Johnson & Son Erectors Co. v. United States, 231 Ct. Cl. 753, cert. denied, 459 U.S. 971 (1982); Triax Pacific v. Stone, 958 F.2d 351 (Fed. Cir. 1982). Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336 (Fed. Cir. 2000), relied upon by the presiding judge, provides no support here, because the contract in Maine Yankee simply did not have a remedy granting clause that covered the Government's failure to begin performance, the issue that led to the litigation. Similarly, in PAE International, ASBCA No. 45314, 98-1 BCA ¶ 29,347, relied upon by the concurring judge, not surprisingly, the contract inspection clause did not limit the Government's breach remedy for fuel oil theft; and in Marine Hydraulics International, Inc., ASBCA No. 46116, 94-3 BCA ¶ 27,057, again, not surprisingly, the Delay of Work clause which provided for recovery of delay related expenses under the existing contract, did not necessarily preclude the recovery of cross-contractual impact damages based upon breach, if such damages could be proven. Unlike the present facts, none of the contracts in the three cases relied upon by the majority included remedy granting clauses addressing the bases of the claims alleged. Therefore, there, breach of contract was the appropriate legal theory.

Under the present facts, the \$5,607.60 in claim preparation expenses arose from the same cruise errors that caused the \$78,164.53 in volume adjustment recovery. By clearly setting forth the recovery allowed to "correction of identifiable errors made in determining the estimated volume," the Adjustment of Volume clause need not contemplate and list all other possible expenses to preclude their recovery. The Adjustment of Volume clause provided the basis upon which bids were prepared and the contract awarded. The effect of the majority decision is to improperly reform the contract "for potential purchasers, who derive a livelihood from the purchase and resale of timber,"⁴ at the expense of the general public who are the statutory beneficiaries of the national forests, and

⁴ The quote is from the portion of the presiding judge's opinion addressing the dissenting opinion.

other purchasers. It is interesting to note that the additional \$5,607.60 awarded by the majority exceeds the \$5,267.16 difference between Appellant's bid, and the bid of the next high bidder.

EDWARD HOURY
Administrative Judge

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